Supreme Court, U.S.
FILED

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No. OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

STEVEN KROUSE,
Petitioner,

v.

NATIONAL RAILROAD PASSENGER CORPORATION,
Respondent.

Petition for Writ of Certiorari to the Court of Appeals for the District of Columbia

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PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. Whether the District of Columbia Court of Appeals violated the mandate of this Court in *Monessen Southwestern R. Co. v. Morgan*, 486 U.S. 330 (1988) requiring state courts to apply federal substantive common law in adjudicating FELA claims?

II. Whether the Court of Appeals improperly applied the discovery rule in a negligent assignment action brought under FELA?

PARTIES

Petitioner is Steven Krouse, a former employee of the National Railroad Passenger Corporation.

Respondent is the National Railroad Passenger Corporation.

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OPINIONS BELOW

The opinion of the Court of Appeals of the District of Columbia is reported at 627 A.2d 489 (D.C. App. 1993). (Appendix, p. 1a). The order of the Superior Court of the District of Columbia has not been published.

JURISDICTION

The Opinion of the Court of Appeals was decided and entered on June 21, 1993. (Appendix, p. 1a). A timely Petition for Rehearing En Banc was filed on July 9, 1993. The petition was denied on March 10, 1994. (Appendix, p. 19a). This petition for certiorari was filed within 90 days of that date. Jurisdiction of this Honorable Court is invoked pursuant to 28 U.S.C. 1257(a).

STATEMENT OF THE CASE

Petitioner Steven Krouse brought this action under the Federal Employers Liability Act (FELA), as amended, 45 U.S.C. §§ 51 *et seq.*, in the District of Columbia Superior Court to recover damages for an injury sustained by him in the course of his employment with the Respondent, National Railroad Passenger Corporation ("Amtrak"). Krouse worked as a car repairman for Amtrak. He injured his ankle initially on January 12, 1987. On January 13, 1987, Petitioner notified his supervisor of the incident, and later sought medical treatment for his injury. The company physician, Josefino Ceballos, M.D., diagnosed his ankle and foot as evidencing ecchymosis.[1] He gave an order to restrict Krouse to light duty.

Krouse's supervisors followed this order briefly and then reassigned him to his regular duties. Performing his duties as a car repairman exacerbated Krouse's injury because Krouse walked constantly over ballast (a gravel-like material). For the next two years, despite Krouse's complaints of pain to various supervisors, Amtrak continued to assign Krouse to duties which aggravated his injury.

In January 1989, Krouse went to see an orthopedic surgeon who recommended that Krouse perform light duty work and to refrain from walking on the ballast because it aggravated Krouse's injured ankle. Krouse informed an Amtrak manager of the physician's recommendation, but the supervisor told him that no light duty work was available. Thereafter, Krouse terminated his employment with Amtrak.

On March 2, 1990 Krouse filed his FELA action, alleging that Amtrak failed to provide him with a safe workplace in violation of FELA by negligently assigning him to work under conditions that were beyond his physical

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[1] Ecchymosis is defined as the pooling of blood under the surface of the skin.

capacity and which aggravated his work related injury. At the close of discovery, Amtrak moved for summary judgment on the ground that the FELA three year statute of limitations barred Krouse's claim because Krouse injured his ankle on January 12, 1987. In opposition, Krouse argued that since his claim was for the continuous tort of negligent assignment, his action was not barred. Krouse argued that under the continuous tort doctrine, the statute of limitations begins to run when the defendant's tortious conduct ceases. Thus, Amtrak's negligence in assigning Krouse to work as a car repairman continued until Krouse discontinued the assignment in January 1989 when he terminated his employment with Amtrak. As a continuous tort, the statue of limitations in this action would not have expired until January, 1992.

The trial court denied Amtrak's motion for summary judgment. It held that Krouse's action was not time-barred under the FELA's limitations period. The trial court stated:

> "[T]he law in the District of Columbia in general tort cases is that the statute of limitations is tolled until the continuing tort ceases to exist. Thus, as long as the tort existed within the previous three years, the action is not time barred . . . and therefore [plaintiff's] action is not time barred." October 1991 Court Order pp. 3-4.

The trial court based its decision on *Page v. United States*, 729 F.2d 818 (D.C. 1984), in which the United States Court of Appeals for the District of Columbia applied the continuous tort doctrine in a case arising under the Federal Tort Claims Act (FTCA). The *Page* court addressed the issue of whether plaintiff's against the Veterans Administration alleging continuing tortious conduct and continuing injury was time-barred under the FTCA's statute of limitations.[2] The United States Court

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[2] The other issue in *Page* was whether the doctrine of res judicata barred plaintiff's claims.

of Appeals for the District of Columbia Circuit held that in cases involving continuing injury caused by on-going tortious conduct, the statute of limitations begins to run when the tortious conduct ceases.

The case proceeded to trial and at the close of testimony, Amtrak moved for directed verdict, again arguing that Krouses's negligent assignment claim was barred under the FELA statute of limitations. The trial court denied Amtrak's motion. The jury returned its verdict in favor of Krouse, finding that Amtrak negligently assigned Krouse to perform work beyond his physical capacity. Krouse was awarded $262,500.00 and in damages.

On appeal, the Court of Appeals of the District of Columbia reversed. Unlike the trial court, the appellate rejected the applicability of the continuing tort doctrine to resolve the statute of limitations issue. *National R.R. Passenger Corp. v. Krouse,* 627 A.2d 489 (D.C. 1993). Instead, the appellate court applied the discovery rule of *Urie v. Thompson,* 337 U.S. 163 (1949) and *United States v. Kubrick,* 444 U.S. 111 (1979) to hold that the FELA statute of limitations began to run when Krouse knew or should have known he was injured and that Amtrak was responsible for his injury. It remanded the case to the lower court to resolve the factual issue of when Krouse became aware of his injury and its cause. *Krouse* 627 A.2d at 498.

Noting that several federal courts have applied the *Uris* and *Kubrick* discovery rule in FELA occupational diseases cases, the Court of Appeals concluded that it "perceive[d] no meaningful distinction between the long exposure of an employee by his employer to work conditions which cause industrial diseases over time and one where the employer negligently assigns the employee and thereby aggravates an injury in such a way that the precise time of the cause and effect cannot be pinpointed." *Krouse* 627 A.2d at 494-96. Those cases, the court reasoned, "provid[ed] the better interpretation of the stat-

ute of limitations rule contained in the FELA consistent with the Supreme Court's interpretation of the discovery rule in *Urie, supra,* and *Kubrick, supra.*" *Id.* at 498.[3] The court of appeals decision is internally inconsistent. On the one hand, the court accepted the continuing nature of the tortious conduct. But, on the other hand, the court refused to toll the statute of limitations while the tortious conduct continued. *Id.* at 495.

No federal court has failed to toll the statute of limitations under FELA when it has concluded that the cause of action involved a continuing tort.

Rejecting the applicability of *Page,* 729 F.2d at 821 n.23, which like *Krouse,* addressed the issue of when the statute of limitations commenced to run on a continuing tort claim, the appellate court stated, "[w]e are not persuaded to follow the *Page* court's interpretation of the statute of limitations under the FTCA in this case which involves a question related to the FELA statute of limitations." *National R.R. Passenger Corp. v. Krouse,* 627 A.2d at 497. The court expressed dissatisfaction with *Page*'s departure from the *Urie* and *Kubrick* discovery rules "which have been utilized by the majority of the federal circuits in determining when a cause of action accrues under the FELA." *Id.* The appellate court also expressed concern that application of the continuing tort doctrine to FELA claims would conflict "with the purpose of the FELA statute of limitations" which is intended "to guard against stale claims and to encourage the prompt presentation of claims." *Id.* (citations omitted).

On July 9, 1993, Petitioner filed a timely petition for rehearing *en banc* with the Court of Appeals. By order

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[3] The court also expressed its doubts about the applicability of the continuing tort doctrine to continuing tort cases when it stated "some [federal trial courts] have had occasion to reject specifically the *so-called* continuing tort doctrine which would toll the statute of limitations until the tortious conduct ceases. *Id.* at 495n.9 (emphasis added).

of March 10, 1994, that petition was denied. (Appendix, p. 19a).

REASONS WHY THE WRIT SHOULD BE GRANTED

I. THE COURT OF APPEALS IGNORED APPLICABLE FEDERAL SUBSTANTIVE LAW.

The District of Columbia Court of Appeals must follow federal common law when interpreting the FELA. In *Monessen Southwestern Ry. Co. v. Morgan,* 486 U.S. 330, 335 (1988), this Court stated "[s]tate courts are required to apply federal substantive law in adjudicating FELA claims." (citations omitted). Although the District of Columbia Court of Appeals noted the preeminence of federal law in resolving FELA claims, *see Krouse,* 627 A.2d at 493, it failed to follow the decisions of the federal circuit courts applying the continuing tort doctrine in FELA cases. *See* e.g., *Fletcher v. Union Pac. Ry. Co.,* 621 F.2d 902, 908 (8th Cir. 1980), *cert. denied,* 449 U.S. 1110, 101 S.Ct. 918, 66 L.Ed.2d 839 (1981) (FELA statute of limitations on employee's negligent assignment claim did not commence until employer's continuous tortious conduct ceased); *Fowkes v. Pennsylvania R.R. Co.,* 264 F.2d 397 (3rd Cir. 1959) (FELA limitations period tolled until employer assigned worker new duties).[4]

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[4] Several lower courts have applied the doctrine to resolve FELA claims, and have specifically rejected the doctrine only when the evidence did not demonstrate a continuous injury. *See* e.g., *Ricard v. Elgin, Joliet & Eastern Ry. Co.,* 750 F.Supp. 372 (N.D.Ind. 1990) (in FELA action involving *latent injury, Urie* rule applies); *Stokes v. Union Pacific R. Co.,* 687 F.Supp. 552, 555 (D.Wyo. 1988) (*Urie* rule found applicable, but court stated that even under continuing tort doctrine, plaintiff could not recover *since there was no continuing injury*); *Courtney v. Union Pacific R. Co.,* 713 F.Supp. 305 (E.D.Ark. 1989) (doctrine can not apply where plaintiff's FELA claim is not based on continuing tortious conduct (i.e., negligent assignment by the defendant/employer was not the issue in the case). *Corrigan v. Burlington Northern R.R., Inc.,* 612 F.Supp. 665 (D.Minn. 1985) (doctrine governs plaintiff's

Further, this Court has long recognized that continuing violations of a statute toll the limitations periods of that statute. *See e.g., Havens Realty Corp. v. Coleman,* 455 U.S. 363, 380 (1982) (claims alleging continuing occurrences of discriminatory housing practices in violation of the Fair Housing Act (FHA) not barred by the FHA 180-day statute of limitations since limitations period tolled until the last incident of discrimination). *See also Hanover Shoe v. United Shoe Mach. Corp.*, 392 U.S. 481, 502 n.15 (1968) (antitrust action challenging defendant's illegal shoe machinery leasing practices dating back to 1912 could be challenged by petitioner in 1955 since the ". . . conduct [had] . . . constituted a continuing violation of the Sherman Act and [had] . . . inflicted continuing and accumulating harm on [petitioner]"). Accordingly, the decision of the District of Columbia Court of Appeals violates long standing federal common law. No federal court has failed to apply the continuing tort doctrine when it has concluded that the cause of action was a continuous tort.

Accordingly, the District of Columbia Court of Appeals has charted a new course, rather than adhere to the commands of established federal common law. In so doing, the court has violated *Monessen, supra.*

Instead, the Court of Appeals relied on *Albert v. Maine Cent. R. Co.,* 905 F.2d 541 (1st Cir. 1990); *Fries v. Chicago & N.W. Transp. Co.,* 909 F.2d 1092

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negligent assignment claim) *Emmons, infra,* 701 F.2d at 1120-21 (rejection of doctrine where facts do not support claim of continuing tortious conduct); *Chatham v. CSX Transportation,* 613 So.2d 341 (Ala. 1993) (doctrine applicable to claims based on negligent assignment); *Vaughan v. Grand Truck Western R.R. Co.,* 396 N.W.2d 440 (Mich. 1986) (same); *But see Briggs, infra,* 190 A.D.2d 1047, 1048 (N.Y. 1993) (plaintiff's claim for work-related injury brought under continuing tort doctrine time-barred under *Urie* discovery rule, but *claim for negligent assignment timely* since FELA limitations tolled until last day plaintiff was subject to conditions causing his injury).

(7th Cir. 1990); *Kitchline v. Consolidated Rail Corp.*, 800 F.2d 356, 358 (3rd Cir. 1986); and *Dubose v. Kansas City S.Ry. Co.*, 729 F.2d 1028 (5th Cir. 1984). None of these cases control the instant action. Those cases dealt with FELA actions based on occupational illnesses, *not* on continuing torts. *See* e.g., *Albert* (work-related hearing loss the basis of plaintiff's claim; continuing tort doctrine not invoked by plaintiff); *Fries* (same); *Kitchline* (pre-existing pulmonary disease aggravated by hazardous work conditions the basis of plaintiff's claim; court rejected plaintiff's argument that continuing tort doctrine controlled since plaintiff had not made out an actionable negligent assignment claim—plaintiff had not requested reassignment to different work invoked and supervisor had no knowledge of plaintiff's injury); *Dubose,* (cancer caused by unsafe work environment the basis of plaintiff's claim; continuing tort doctrine not invoked).

The Court of Appeals rationalized its decision by stating that it saw "no meaningful distinction between the long exposure of an employee by his employer tc work conditions which cause industrial diseases over time and one where the employer negligently assigns the employee and thereby aggravates an injury in such a way that the precise time of the cause and effect cannot be pinpointed." *Krouse* at 494-96. But the court erred in failing to perceive that there *is* an important distinction between occupational disease cases and negligent assignment cases. Unlike the District of Columbia Court of Appeals, courts dealing with the issue of whether the continuing tort doctrine or the discovery rule apply in a FELA action, *have* distinguished between the two types of claims, applying the discovery rule over the continuing tort doctrine only when applicable. *See, e.g., Emmons v. Southern Pacific Transp. Co.*, 701 F.2d 1112, 1120-21 (5th Cir. 1983) (continuing tort doctrine can not apply where employer's single act of negligence does not amount to a continuing tort and where employer had no knowledge of worker's

work-related injury; thus, trial court did not err in relying on *Urie*); *Courtney v. Union Pacific R. Co.*, 713 F.Supp. 305, 310 (E.D. Ark. 1989) (*Urie* and *Kubrick* discovery rules apply instead of continuing tort theory where plaintiff's claim is not for negligent assignment); *Briggs v. Consolidated Rail Corp.*, 190 A.D.2d 1047, 1048 (N.Y. 1993) (*Urie* rule applicable to plaintiff's work-related injury claim, but continuing tort doctrine applicable to negligent assignment claim).[5]

Further, the Court's argument that the continuing tort doctrine fails to guard against stale claims being brought under the FELA is flawed. In its approach, the Court ignored an important fact: under the continuing tort doctrine, concerns regarding the staleness of claims disappear because of the continuing nature of the tortious activity. *See Havens Realty Corp. v. Coleman*, 455 U.S. at 380, *supra*, ("[w]here the challenged violation is a continuing one, the staleness concern disappears").

The District of Columbia Court of Appeals' reversal, and thus, its refusal to apply the continuing tort doctrine to resolve appellant's negligent assignment claim was erroneous. Accordingly, this Court must grant certiorari to reverse the lower court's holding.

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[5] More important, the courts have also noted the limitations of the discovery rule. *See Dubose v. Kansas City Southern Ry. Co.*, 729 F.2d 1026 (1984) (the federal "discovery rule" was developed by the Supreme Court "to mitigate the harshness of applying statutes of limitations strictly in cases involving *medical malpractice, occupational diseases, and other types of latent injuries*") (emphasis added); *See also, Kitchline v. Consolidated Rail Corp.*, 800 F.2d 356, 358 (3rd Cir. 1986) ("[u]nder *Urie's* rationale, when *an occupational illness* is the basis for the claim under FELA, the statute of limitations begins to run when the employee becomes aware of his disease and its cause") (emphasis added); *Gross v. United States*, 676 F.2d 295, 300 (8th Cir. 1982) ("[w]here the tortious conduct is of *a continuing nature*, the *Kubrick* rule does not apply") (emphasis added).

II. THE DISTRICT OF COLUMBIA COURT OF APPEALS DECISION IS LIKELY TO CONFLICT WITH THE DISTRICT OF COLUMBIA CIRCUIT COURT'S DECISIONS.

The appellate court's decision is inconsistent with those decisions of the District of Columbia Circuit Court holding that the statute of limitations for a continuous tort does not begin to run until the tortious conduct ceases. *See Page*, supra. *See also, Betty v. Washington Metropolitan Area Transit Authority*, 860 F.2d 1117 (D.C. Cir. 1988); *Macklin v. Spector Freight Systems, Inc.*, 478 F.2d 979 (D.C. Cir. 1973); *Underwater Storage Inc.*, 371 F.2d 950 (D.C. Cir. 1966). Based on these cases, it is likely that in an action for negligent assignment under the FELA, the United States District Court for the District of Columbia will adhere to the continuing tort doctrine. But following the *Krouse* decision, the District of Columbia Superior Court is obliged to apply the discovery rules of *Urie* and *Kubrick* in resolving negligent assignment actions in FELA cases.

Accordingly, the Court of Appeals created a conflict between the United States District Court for the District of Columbia and the District of Columbia Superior Court. Now in the District of Columbia, the computation of the statute of limitations under FELA for claims of negligent assignment is likely to depend upon whether the action is tried in the United States District Court of the District of Columbia or in the Superior Court of the District of Columbia. The Court of Appeal's failure to conform to the District of Columbia Circuit on this issue will lead to forum shopping by plaintiffs filing claims under FELA and/or discriminatory treatement of like litigants who have sought redress under the same law. Such results requires reversal in this case.

CONCLUSION

The writ of certiorari should be granted and the judgment below reversed.

Respectfully submitted,

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APPENDICES

APPENDIX A

DISTRICT OF COLUMBIA COURT OF APPEALS

NATIONAL RAILROAD PASSENGER CORPORATION
Appellant,

v.

STEVEN KROUSE,
Appellee.

Appeal from the Superior Court of the
District of Columbia

(Hon. Colleen Kollar-Kotelly, Trial Judge)

(Argued May 4, 1993 Decided June 21, 1993)

Mark S. Landman, with whom *William G. Ballaine* and *William A. Edelson* were on the brief, for appellant.

H. Vincent McKnight, Jr. for appellee.

Before TERRY and WAGNER *Associate Judges,* and KERN *Senior Judge.*

WAGNER, *Associate Judge*: Appellee, Steven Krouse brought this suit against his former employer, National Railroad Passenger Corporation (Amtrak), under the Federal Employers' Liability Act (FELA), 45 U.S.C. §§ 51-60 (1988), for damages for injuries allegedly caused by Amtrak's negligence.[1] Krouse's theory of liability was that Amtrak negligently assigned him to work under conditions which it knew or should have known were beyond his physical capacity and which aggravated a knee and ankle

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[1] Under the FELA, a common carrier engaged in interstate commerce is liable for damages for injuries sustained by any person while employed by the carrier which result in whole or in part from the negligence of any of the carrier's officers, agents, or employees. 45 U.S.C. § 51.

injury he had sustained on the job. A jury found that Amtrak's negligence contributed to Krouse's injuries and that Krouse's contributory negligence was responsible for his injuries to the extent of twenty-five percent. Judgment was entered for Krouse on the jury verdict in the amount of $262,500, representing the amount of damages as "diminished by the jury in proportion to the amount of negligence attributable to [the] employee." *See* 45 U.S.C. § 53. Appellant's principal argument on appeal is that the trial court erred in holding that appellee's claim for negligent assignment was not barred because the cause of action did not accrue under the FELA's statute of limitations until the employer's tortious conduct ceased. We agree and hold that a cause of action under the FELA accrues when the claimant knows or, in the exercise of reasonable diligence, should know of the injury and its cause and that the limitations period is not tolled beyond that date. Since the resolution of a factual question is required to resolve the limitations question, applying a different legal standard from that relied upon by the trial court, we vacate the judgment in favor of appellee and remand the case for further proceedings and a new trial consistent with this opinion.

I.

While performing his job as a car repairman for Amtrak on January 12, 1987, Krouse fell from a train and injured his ankle. The next day, Krouse notified his supervisor, Bernard Campbell, about the incident and told him that he needed medical attention. It was not until January 15, 1987 that Campbell completed injury report forms and referred Krouse to Amtrak's medical dispensary, where Dr. Josefino Ceballos diagnosed that he had a severely sprained ankle, with ecchymosis of the right ankle and foot.[2] Dr. Ceballos recommended that Krouse wear a

[2] Dr. Ceballos explained that ecchymosis is the pooling of blood under the surface of the skin.

figure eight ankle brace, work light duty for three weeks, and refrain from walking excessively.[3] Dr. Ceballos informed Krouse's supervisors of the recommendation for light duty. The evidence was disputed as to whether the doctor arranged a follow-up visit with Krouse; however, the undisputed evidence shows that there were no follow-up visits.

After being informed of Dr. Ceballos' recommendation, Campbell assigned Krouse to a desk job on January 16th, but another supervisor relieved him of the assignment about two hours later after someone from the union complained about Krouse performing managerial functions. Mr. Campbell reassigned Krouse to his regular duties as a car repairman. Krouse continued to experience a mild swelling of the ankle, and he walked with a limp. He noticed that these conditions occurred more in the evening and near the end of the week. Krouse also testified that his ankle hurt worse once he returned to work in late January 1987 following a brief vacation.

Krouse complained of pain to his supervisors and coworkers intermittently between January 13, 1987 and early 1988. None of Krouse's successor supervisors was informed of his condition, and they continued to assign him jobs which required extensive walking over ballast (a gravel-like material). Finally, Krouse complained of extreme pain to his last supervisor, who accommodated him with breaks when he needed them. The evidence at trial showed that in spite of his persistent pain, Krouse signed Amtrak forms on February 3, 1987 and February 23, 1987 certifying that he could perform regular duties and had no restriction of motion. The evidence also showed that Krouse did not seek medical attention for the two years following the injury and that he worked at outside jobs involving prolonged standing or physical labor while employed at Amtrak.

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[3] Dr. Ceballos defined excessive walking as more than fifty yards repeatedly, about three or four times a day.

Krouse contacted an attorney on January 24, 1989 who referred him to an orthopedic surgeon, Dr. Frank Watkins. Dr. Watkins concluded that appellee's prolonged walking on uneven surfaces delayed the healing of Krouse's initial injury and further aggravated his injured ankle. Dr. Watkins advised Krouse to perform only light duty and to avoid walking on the ballast because it would further aggravate and damage his ankle. Amtrak's manager stated that such work was not available, and Krouse did not return to work for Amtrak thereafter.

Dr. Watkins referred Krouse to another specialist, Dr. Phillip Omohundro, who also attributed the severity of Krouse's injury to his continued walking over uneven surfaces at Amtrak. Dr. Omohundro determined that Krouse had a five percent permanent, partial impairment of the right ankle and a ten percent partial impairment of the right knee. Appellee's occupational disease expert, Dr. Mark Bradley, also attributed Krouse's permanent disability to his walking over uneven surfaces for prolonged periods and to the failure of appellant's medical department to restrict appellee's duties appropirately and follow up on the status of his injury and treatment.

After extensive discovery, Amtrak moved for summary judgment, arguing that the undisputed facts showed that the FELA's statute of limitations, 45 U.S.C. § 56, on Krouse's claim of negligent assignment commenced to run more than three years before appellee filed suit on March 2, 1990. Essentially, appellant possessed sufficient information concerning his injury and its possible cause to put him on notice of a possible claim more than three years before he filed his complaint.[4] In opposition, appellee

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[4] Amtrak also contended that any claim of medical malpractice by plaintiff had to be based on Dr. Ceballos' treatment on January 16, 1987, and therefore, was time-barred. However, appellee's counsel represented in a memorandum in opposition to the motion for summary judgment that he was not asserting a medical malpractice claim in this case. Rather, appellee contended that his claim was one for negligent assignment arising out of the conduct of his supervisors and personnel in Amtrak's medical department.

contended his complaint was for a continuous tort, negligent assignment, for which the statute of limitations is tolled until the employee's exposure to the dangerous conditions ceases. Therefore, appellee argued, the statute of limitations commenced to run when he finally terminated his employment with Amtrak on January 25, 1989. Finding persuasive the analysis in *Page v. United States,* 234 U.S. App. D.C. 332, 729 F.2d 818 (1984), a case interpreting the limitations provision in the Federal Tort Claims Act (FTCA),[5] the trial court accepted the proposition that for torts involving a continuing injury, the cause of action accrues for statute of limitations purposes when the tortious conduct ceases. 234 U.S. App. D.C. at 335, 729 F.2d at 821. Therefore, the trial court denied appellant's motion for summary judgment, and the case proceeded to trial.

Appellant argues on appeal that appellee's claim is barred by operation of the FELA's statute of limitations, 45 U.S.C. § 56. It is appellant's position that the undisputed facts disclosed in connection with Amtrak's summary judgment motion, as well as the evidence adduced at trial, revealed that appellee knew or should have known prior to three years before filing suit the facts essential to place him on notice of a claim against Amtrak. According to appellant, it is these circumstances which determine when the cause of action accrues under the FELA's statute of limitations. Appellee argues that his claim is one for negligent assignment, a continuing tort, and that the statute of limitations under the FELA does not commence to run until the employer ceases to assign the employee to the harmful activity. It is appellee's position that the statute of limitations is tolled under such circumstances until the last day the employee was subjected to the conditions which caused the injuries, as the trial court concluded. To resolve the question presented by the parties' competing arguments, we examine the federal statute and pertinent case law.

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[5] 28 U.S.C. § 2401 (b) (1976).

II.

An action cannot be maintained under the FELA unless commenced within three years from the date the cause of action accrued. 45 U.S.C. § 56. In interpreting the limitations provision in the FELA, we are required to apply federal substantive law. *See Monessen Southwestern Ry. Co. v. Morgan*, 486 U.S. 330, 335 (1988); *see also Page, supra*, 234 U.S. App. D.C. at 334, 729 F.2d at 820.[6] In cases arising under the FELA, a plaintiff has the burden of alleging and proving that his cause of action has been brought within the period of limitations. *Brassard v. Boston & Maine R.R.*, 240 F.2d 138, 141 (1st Cir. 1957); *Frasure v. Union Pacific R. Co.*, 782 F. Supp. 477, 479 (C.D. Cal. 1991). Compliance with the FELA statute of limitations is construed as a condition precedent to recovery, and the failure to bring suit timely bars not only the claimant's remedy, but also destroys the employer's liability. *Emmons v. Southern Pacific Transp. Co.*, 701 F.2d 1112, 1117 (5th Cir. 1983); *Dixon v. Martin*, 260 F.2d 809, 811 (5th Cir. 1958); *Frasure*, 782 F. Supp. at 479. While the FELA statute of limitations is an affirmative defense, the burden is nevertheless on the plaintiff to establish that his case falls within an exception if brought outside of a three-year time frame. *Emmons*, 701 F.2d at 1117-18; *Frasure*, 782 F. Supp. at 480; *see also Drazen v. United States*, 762 F.2d 56, 60 (7th Cir. 1985) (applying the same rule under the FTCA).

The FELA does not provide a method for determining when a cause of action accrues; therefore, we look to federal case law for that interpretation. *Albert v. Maine Cent. R. Co.*, 905 F.2d 541, 543 (1st Cir. 1990); *Dubose v. Kansas City S. Ry. Co.*, 729 F.2d 1026, 1028 (5th Cir. 1984); *see also Monessen, supra*, 486 U.S. at 335. Cases which involve a traumatic injury or a single

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[6] *Page* involved the interpretation of statutory time limitations under the FTCA.

breach of duty and an immediately manifest injury pose little difficulty in determining the commencement of the limitations period. In such cases, the general rule for torts is that the cause of action accrues at the time the plaintiff's interest is invaded or at the time the tortious act is committed which causes injury. *Clay v. Union Carbide Corp.*, 828 F.2d 1103, 1106 (5th Cir. 1987); *Brassard, supra*, 240 F.2d at 141 (citing RESTATEMENT, TORTS § 899 comment c). More problematic are cases involving latent injuries which cannot be discovered immediately or those where the injury has an indefinite onset and progresses over many years unnoticed. *See Kichline v. Consolidated Rail Corp.*, 800 F.2d 356, 358 (2d Cir. 1986). In such cases, federal courts have applied a discovery rule, derived from the interpretation of the United States Supreme Court in two cases, *Urie v. Thompson*, 337 U.S. 163 (1949) and *United States v. Kubrick*, 444 U.S. 111 (1979).[7]

In *Urie*, the plaintiff sued his employer for damages under the FELA claiming that he had contracted silicosis, a lung disease, as a result of inhaling silica dust during the thirty years or so preceding the filing of suit. 337 U.S. at 165-66. Urie's condition was first diagnosed, and he ceased work, one year before filing his complaint. *Id.* The Supreme Court was persuaded that neither the intent of the FELA nor the traditional purposes of statutes of limitations would be served by interpreting the Act to bar an assertion of claims which were unknown and unknowable in time to file within the specified period of limitations. *Id.* Therefore, the court set forth a discovery rule, holding that the cause of action accrues when the accumulated effects of the deleterious substance manifest themselves. *Id.* at 170 (quoting *Associated Indemn. Corp. v.*

[7] Although *Kubrick* arose under the FTCA, federal courts have relied upon it in conjunction with *Urie* in setting the parameters of the discovery rule under the FELA. *Albert, supra*, 905 F.2d at 544; *Dubose, supra*, 729 F.2d at 1030; *see also Kichline, supra*, 800 F.2d at 358-59.

State Industrial Accident Comm'n, 124 Cal. App. 378, 381, 12 P.2d 1075, 1076 (1932)).

In *Kubrick, supra*, the Supreme Court applied the discovery rule in a case under the FTCA and held that the statute of limitations begins to run from the time the injured party has sufficient critical facts to put him on notice that a wrong has been committed for which he should undertake an investigation to determine his entitlement to redress. 444 U.S. at 123 [8] At issue in *Kubrick* was whether a claim for medical malpractice under the FTCA accrues "when the plaintiff knows both the existence and the cause of his injury or at a later time when he knows that the acts inflicting the injury may constitute medical malpractice." *Id.* at 113. The rule derived from *Kubrick* is that the statute of limitations begins to run from the time that the plaintiff has sufficient facts to put him or her on notice of the injury and its probable cause. *Id.* at 117. The Supreme Court rejected the notion that for statute of limitations purposes a plaintiff's ignorance of his legal rights should be treated the same as his lack of knowledge of the fact of the injury and its cause. *Id.* Having knowledge of the fact of the injury and who caused it, a putative malpractice plaintiff is required under the *Kubrick* rule to determine within the period of

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[8] In conceding the application of the discovery rule in a dental malpractice case, this court stated that it rejected the Supreme Court's interpretation of the discovery rule in *Kubrick* insofar as it required only knowledge of the injury and its probable cause to commence the running of the limitations period. *Bussineau v. President & Directors of Georgetown College*, 518 A.2d 423, 435 (D.C. 1986). In *Bussineau*, we noted our adherence to the following rule: "for a cause of action to accrue where the discovery rule is applicable, one must know or by the exercise of reasonable diligence should know (1) of the injury, (2) its cause in fact, and (3) of some evidence of wrongdoing." *Id.* The *Bussineau* rule is not determinative of the outcome in this case because we address here the meaning of accrual of a cause of action under a federal statute for which we must look to federal case law for interpretation. *See Albert, supra*, 905 F.2d at 543; *Dubose, supra*, 729 F.2d at 1028.

limitations, with the help of professional advice if necessary, whether to sue or not.. *Id.* at 124.

In resolving cases under the FELA, federal courts have applied the discovery rule as set forth in *Urie* and refined by *Kubrick* for injuries or illnesses which manifest themselves sometime after the initial exposure to the harm or after continued exposure to it. *See, e.g., Fries v. Chicago & N.W. Transp. Co.*, 909 F.2d 1092, 1095 (7th Cir. 1990) (employee has affirmative duty to investigate potential cause of injury, and statute of limitations not tolled beyond date when injury manifests itself); *Albert, supra*, 905 F.2d at 544 (statute of limitations commences to run when employees become aware of the disease and its cause; employees have duty to investigate upon discovering what they believe to be a work-related injury); *Kichline, supra*, 800 F.2d at 360 (accrual date for limitations purposes does not extend beyond time claimant becomes aware of injury and its cause); *Dubose, supra*, 729 F.2d at 1030 (*Kubrick* defines outer limits of discovery rule under the FELA).[9] In *Fries, supra*, the employee sued the employer for damages claiming negli-

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[9] Federal trial courts have also applied the discovery rule as derived from *Urie* and *Kubrick* under which the cause of action accrues when a plaintiff has knowledge of his injury and its possible cause. *See Frasure, supra*, 782 F. Supp. at 480; *Ricard v. Elgin, Joliet & Eastern Ry. Co.*, 750 F. Supp. 372, 374-75 (N.D. Ind. 1990); *Stokes v. Union Pacific R. Co.*, 687 F. Supp. 552, 555 (D. Wyo. 1988); *Corrigan v. Burlington Northern R.R., Inc.*, 612 F. Supp. 665, 668 (D. Minn. 1985). Some have had occasion to reject specifically the so-called continuing tort doctrine which would toll the statute of limitations until the tortious conduct ceases. *Ricard, supra*, 750 F. Supp. at 375 (defendant's continuing tortious conduct does not toll statute of limitations when plaintiff has knowledge of the fact of injury and its possible cause); *Stokes, supra*, 687 F. Supp. at 554 (continuing tortious conduct by a defendant will not stop limitations clock once plaintiff obtains requisite information of injury and cause at an earlier date); *but see Corrigan*, 612 F. Supp. at 668 (adopting the tolling rule from decision under the FTCA in a FELA suit for negligent assignment).

gent assignment in that the employer required him to work near loud industrial noise and failed to provide him with ear protection. 909 F.2d at 1094. The court adopted a rule that the statute of limitations accrues when the injured party discovers the injury and its potential cause. *Id.* In *Albert,* the appellant contended that the statute of limitations could not begin to run until the injured party knows definitely that his injury is work-related. 905 F.2d at 544. The *Albert* court disagreed and held that once the claimants believed that they had a hearing loss which was caused by employment, they had a duty to investigate to confirm or deny that belief. *Id.* Like the *Fries* court, the *Albert* court expressed the view that to hold otherwise would render the FELA statute of limitations meaningless. *Id.*

Applying the rules extracted from this line of cases, appellant argues that the undisputed facts show that Krouse was aware of the requisite facts to start the running of the statute of limitations more than three years preceding the filing of his complaint. Before addressing that claim, we reject appellee's argument that the continuing tort of negligent assignment differs from the occupational illness cases in such a way as to warrant a different interpretation of the statute of limitations. Rather, we agree with appellant that such cases also involve continuing torts, an ongoing breach of duty with injuries resulting from a succession of negligent acts. *See Fogg v. National R.R. Passenger Corp.,* 585 A.2d 786, 789 (D.C. 1991).[10] Here, appellee contended that his

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[10] In *Fogg,* we recognized the railroad's continuing duty to assign its employees to work for which they are reasonably suited and that it breaches that duty if it negligently assigns the employee to work beyond his capacity. We also approved the trial court's jury instruction stating the law on an employer's liability under the doctrine of negligent assignment. *Id.* at 789. After explaining that the employer has a continuing duty, the trial court instructed the jury, and we approved the following statement of the law:

> A railroad company breaches that duty if it negligently requires its employee to perform work beyond her physical capacity,

employer negligently assigned him to a job which exposed him to an unreasonable risk of harm which resulted in an injury caused by extensive walking over uneven surfaces over a long period of time. We perceive no meaningful distinction between the long exposure of an employee by his employer to work conditions which cause industrial diseases over time and one where the employer negligently assigns the employee and thereby aggravates an injury in such a way that the precise time of the cause and effect cannot be pinpointed.

To support his argument that the statute of limitations did not commence to run in this case until the tortious conduct ceased, upon termination of his employment, appellee relies on *Fletcher v. Union Pac. Ry. Co.*, 621 F.2d 902 (8th Cir. 1980), *cert. denied*, 449 U.S. 1110 (1981). In *Fletcher*, the plaintiff injured his back in 1962 and continued to perform his job which required heavy lifting until 1975 when he was given light duty. Fletcher's doctor had written the railroad in 1973 recommending light duty. Fletcher was rejected for disability in July 1974 after which he was told he needed a fusion operation. On March 4, 1975, he notified the railroad that he was making a claim. On April 16, 1975 his doctor told him he could not return to his current job, and he commenced suit on June 8, 1977. Fletcher sought to recover both for his original back injury and negligent assignment to jobs which required him to lift heavy objects after his employer was placed on notice of his injury. The *Fletcher* court reversed the lower court's dismissal of the second count on statute of limitations

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that is if the Defendant knew or should have known of the Plaintiff's diminished work capacity and in spite of that knowledge Defendant unreasonably continued to assign Plaintiff to tasks that Defendant knew or should reasonably have known would aggravate her physical condition.

Id.; see also Ragsdell v. Southern Pac. Transp. Co., 688 F.2d 1281, 1283 (9th Cir. 1982) (employer has continuous duty to provide employers with a reasonably safe place to work).

grounds, holding that the negligent assignment claim, which represented a separate action for negligence, apart from the original injury, occurred within the three years preceding the date that Fletcher filed suit. *Id.* at 908. Noting that at least one FELA case applied a tolling principle until the tortious conduct ceased or until the last day that the employee was subjected to the conditions which cused the injury, the court held that the railroad's negligent conduct did not stop until it assigned Fletcher to lighter work, which was sometime after April 16, 1975. The court relied on *Fowkes v. Pennsylvania R.R. Co.*, 264 F.2d 397 (3d Cir. 1959), in support of its holding.

Appellant argues that *Fletcher* is wrongly decided as a result of a misreading of the Third Circuit's decision in *Fowkes*. Appellant's position appears to be well taken, particularly in light of a Third Circuit decision more than thirty years later clarifying the *Fowkes* rule and identifying the outer limits of any tolling exception to the limitations period in a FELA case once a plaintiff has discovered the injury and its cause. *See Kichline, supra,* 800 F.2d at 356.[11] In *Kichline,* the plaintiff filed suit more than three years after learning that his pulmonary disease had been aggravated by exposure to diesel fumes in the workplace. *Id.* at 357. The court rejected Kichline's argument that his cause of action did not accrue

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[11] Appellee argues that *Kichline* does not support appellant's claim on appeal because under *Kichline* an aggravation of an injury would not be time-barred. However, *Kichline* recognized a separate cause of action for aggravation apart from a claim of negligent assignment. *Id.* at 361. The *Kichline* court held that any claim for which plaintiff had knowledge of his injury prior to three years before filing suit would be barred. *Id.* at 360. However, the court also held that a cause of action for aggravation which occurred within the limitations period would not necessarily be barred. *Id.* at 361. The court acknowledged the difficult burden that plaintiff would face in attempting to establish the extent of the injury occurring within the limitations period. *Id.*

until his retirement, when his exposure to the harmful substance finally ceased. *Id.* at 357. The court distinguished its earlier holding in *Fowkes* on the basis that the jury had found specifically that Fowkes was not aware of the condition which prompted the lawsuit for more than three years before filing. *Id.* at 359. Significantly, the *Kichline* court observed that "*Fowkes* can be fairly read as implying that had identification of the injury and its cause occurred before employment terminated, the discovery of the injury rather than the cessation of work would have marked the beginning of the limitations period." *Id.* The court specifically rejected the proposition that a different rule obtains for a continuing tort. *Id.* at 360. It also rejected the notion that *Fowkes* could be read to mean that the *Urie* discovery rule is inapplicable where employment and exposure to a dangerous condition continue after the employee-claimant becomes aware of the injury and its cause. *Id.* Rather, the court stated:

> We understand *Fowkes* to mean that continuing conduct of a defendant will not stop the ticking of the limitations clock begun when plaintiff obtained requisite information. On discovering an injury and its cause, a claimant must choose to sue or forego that remedy.

Id.[12]

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[12] While dismissing Kichline's main claim, the court remanded the case for further proceedings on any cause of action which he might have for aggravation occurring within the period of limitations. *Kichline, supra,* 800 F.2d at 361. Such claims would not be extinguished, and the plaintiff's awareness of the effects of the harmful conditions to which he was exposed would be relevant to his contributory negligence under the court's holding. *Id.* Other courts have refused to recognize that aggravation of a condition can be treated as a severable cause of action for statute of limitations purposes for the reason that it violates the spirit of the discovery rule. *See Fries, supra,* 909 F.2d at 1095-96; *Alexander v. Missouri Pacific R. Co.,* 827 S.W. 2d 757, 759-60 (Mo. App. 1992); *Frasure, supra,* 782 F. Supp. at 480-81.

Appellee also relies, as did the trial court, upon the D.C. Circuit case of *Page*. In a suit under the FTCA, relying on *Fletcher*, the *Page* court also held that when the tort involves a continuing injury, the limitations period begins to run when the tortious conduct ceases. *Page* involved a claim by a veteran for injuries resulting from drug treatment administered through the Veterans Administration between 1961 and 1980 which Page did not challenge until 1981. 234 U.S. App. D.C. at 333, 729 F.2d at 819. Rejecting the availability of the *Kubrick* rule, the court held that regardless of when plaintiff learned that he had reason to sue, the limitations period could not have expired on any malpractice claim within two years of his administrative presentation because of the involvement of the continuing injury. The court held that in such cases the cause of action accrues at the time the tortious conduct cases. The court noted that since no single incident in the continuous chain of tortious activity can be identified realistically as the cause of significant harm, it is proper to regard the cumulative effect of the conduct as actionable. 234 U.S. App. D.C. at 335-36, 729 F.2d at 821-22. The court also relied upon *Gross v. United States*, 676 F.2d 295 (8th Cir. 1982).[13]

We are not persuaded to follow the *Page* court's interpretation of the statute of limitations under the FTCA in this case which involves a question related to the FELA statute of limitations. *Page* departs from the *Urie* and *Kubrick* rules which have been utilized by the majority of the federal circuits in determining when a cause

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[13] In *Gross*, the court found that the Department of Agriculture had intentionally inflicted emotional distress upon the plaintiff by wrongfully denying him an opportunity to participate in certain federal programs over an extended period of time. The government contended that the FTCA statute of limitations barred suit unless it was tolled and that the statute of limitations began to run when plaintiff knew of his injury. The court rejected the government's *Kubrick* argument, holding that the rule in *Kubrick* does not apply in cases of continuing torts. *Gross, supra*, 676 F.2d at 300.

of action accrues under the FELA. To the extent that the *Page* court relied on *Fletcher,* for the reasons expressed above, we do not regard it as persuasive authority. Moreover, the *Page* rule would be at odds with the interpretation of the FELA by the more persuasive federal cases and with the purpose of the FELA statute of limitations. The purpose of the FELA satute of limitations is to guard against stale claims and to encourage the prompt presentation of claims. *See Kubrick, supra,* 444 U.S. at 117. As the *Kichline* court observed:

> To further the remedial purposes of FELA, *Urie* granted an extension of time to a claimant who was unaware of his injury. Once discovery occurs, however, it becomes necessary to consider the other side of the coin—the policy against presentation of stale claims. Although the continuing violation concept implies that the liability feature of the claim has not become stale, the same cannot be said of the damages phase. Proof relevant to reduction of damages which a defendant might be able to produce soon after the time the plaintiff discovers his injury may become difficult to obtain because of the passage of time if presentation of the claim is postponed. If the discovery rule is not enforced, damages can continue indefinitely, accumulating at the option of the claimant.

800 F.2d at 360. We are persuaded that the cases upon which we rely here provide the better interpretation of the statute of limitations rule contained in the FELA consistent with the Supreme Court's interpretation of the discovery rule in *Urie* and *Kubrick*. Therefore, we follow them.

Accordingly, we hold that the statute of limitations under the FELA commenced to run on the negligent assignment claim when appellee knew or should have known of his injury and that its possible cause was work-related. *Fries, supra,* 909 F.2d at 1095; *see Kichline, supra,* 800

F.2d at 360. The statute of limitations is not tolled beyond that date. *Fries,* 909 F.2d at 1095; *Kichline,* 800 F.2d at 360. However, we cannot say on this record when appellee should have known that his continual walking on ballast was aggravating his condition as opposed to any belief he might have had that it was his original injury and the recovery process associated with it which was causing his problem. Here, the original injury occurred on January 12, 1987. Appellee filed suit on March 2, 1990. Appellee must demonstrate that the period of limitations was tolled between January 12 and March 2, 1987, the latter date marking three years before he filed suit. Many facts must be weighed and inferences resolved by the factfinder in making that determination.[14] That is not our appellate function. *Capital Transit Co. v. Bingman,* 94 U.S. App. D.C. 75, 76-77, 212 F.2d 241, 242 (1954); *Trout v. Lehman,* 226 U.S. App. D.C. 357, 363, 702 F2d 1094, 1100 (1983), *vacated on other grounds,* 465 U.S. 1056 (1984). Therefore, we remand for further proceedings where the answer to that question can be established.

Relying on *Kichline, supra,* appellee also argues that all claims are not necessarily barred, specifically a claim for aggravation for the original injury occurring during an unbarred period. In *Kichline,* the court held that if plaintiff could establish a claim for damages for aggravation which occurred within the statutory period, then that particular claim would not be time-barred. 800 F.2d at 361; *see supra* note 11. The statute of limitations will have little meaning if a putative plaintiff can discover his injury and its cause, but prolong the period of limitations indefinitly by asserting a claim for aggravation. Some courts have rejected this notion in spite of *Kich-*

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[14] In *Fowkes, supra,* the jury was asked whether plaintiff knew or should have known that the physical condition for which he claimed damages occurred before the critical date. 246 F.2d at 398. Such interrogatories are particularly helpful to the review of cases such as this one.

line's holding to the contrary. *See Alexander, supra* note 12, 827 S.W. 2d at 759-60; *Frasure, supra,* 782 F. Supp. at 477. In this regard, the *Kichline* rule is contrary to the spirit and intent of the discovery rule as derived from *Urie* and *Kubrick* and applied generally in the FELA cases. Accordingly, we decline to follow the reasoning of *Kichline* that the aggravation of an employee's condition would be treated as a severable cause of action for statute of limitations purposes.

III.

Appellants also argues that the trial court abused its discretion in admitting evidence of the time-barred medical malpractice claim. Appellant contends that the evidence was irrelevant to the negligent assignment claim, or alternatively, its probative value was outweighed by its unduly prejudicial effect. Although we reverse on other grounds, we address the issue because it may arise at any retrial. In a negligent assignment case, a plaintiff must prove that the railroad, through its agents, knew or should have known of the employee's diminished work capacity and nevertheless assigned him tasks which exposed him to an unreasonable risk of harm. *Fogg, supra,* 585 A.2d at 789. Medical personnel of an employer are its agents, and their knowledge of the employee's condition will place the railroad on notice of it. *Isgett v. Seaboard Coast Line R.R. Co.,* 332 F. Supp. 1127, 1141 (D.S.C. 1971); *Mroz v. Dravco Corp.,* 293 F. Supp. 499, 508 (W.D. Pa. 1968), *aff'd,* 429 F.2d 1156 (3d Cir. 1970). Evidence that Dr. Ceballos was an agent for the railroad, that he was aware of appellant's condition, and that he failed to take steps to cause Amtrack to restrict his work, was pertinent to appellee's proof of the negligent assignment claim. *See Fogg,* 585 A.2d at 789. Therefore, we find no abuse of discretion in the trial court's evidentiary ruling.[15]

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[15] Prior to trial, having ruled that only the negligent assignment claim would proceed to trial, the trial court properly barred any

For the foregoing reasons, we reverse and remand for further proceedings and for a new trial consistent with this opinion.

Reversed and remanded.

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reference to the inadequacy of the treatment that appellant's agent provided Krouse.

APPENDIX B

[Filed Mar. 10, 1994]

DISTRICT OF COLUMBIA COURT OF APPEALS

No. 92-CV-375

NATIONAL RAILROAD PASSENGER CORP.,
Appellant,

v.

STEVEN KROUSE,
Appellee.

Before: Rogers, Chief Judge; Ferren, Terry, Steadman, Schwelb, Farrell, Wagner, King, and Sullivan,* Associate Judges.

ORDER

On consideration of appellee's petition for rehearing en banc, and the response thereto; and it appearing that no judge of this court has called for a vote on the petition for rehearing en banc, it is

ORDERED that the petition for rehearing en banc is denied.

PER CURIAM

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* Associate Judge Sullivan has recused himself from this case.

Supreme Court, U.S.
FILED
JUL 20 1994
OFFICE OF THE CLERK

No. 93-1959

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

STEVEN KROUSE,

Petitioner,

v.

NATIONAL RAILROAD PASSENGER CORPORATION,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE DISTRICT OF COLUMBIA COURT OF APPEALS

BRIEF IN OPPOSITION

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24 pp

QUESTION PRESENTED

Whether the District of Columbia Court of Appeals properly applied applicable federal common law principles in holding that the FELA's three-year statute of limitations commenced to run on a negligent assignment claim when petitioner knew or should have known of his injury and that its possible cause was work-related.

RULE 29.1 LISTING

The National Railroad Passenger Corporation has no parent companies or subsidiaries.

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No. 93-1959

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1993

STEVEN KROUSE,

Petitioner,

v.

NATIONAL RAILROAD PASSENGER CORPORATION,

Respondent.

On Petition for Writ of Certiorari to the District of Columbia Court of Appeals

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BRIEF IN OPPOSITION

STATEMENT OF THE CASE

Petitioner Steven Krouse ("Krouse" or "petitioner") commenced this action on March 2, 1990 against respondent National Railroad Passenger Corporation ("Amtrak" or "respondent") under the Federal Employers' Liability Act ("FELA"), 45 U.S.C. §§ 51-60 (1981), seeking damages due to injuries allegedly caused by Amtrak's negligence. Petitioner's theory of liability was that beginning on January 16, 1987, four days after he suffered an ankle injury while at work, Amtrak

negligently assigned Krause to perform his regular duties, thereby aggravating his original injury (A-1a-4a).[1]

Although petitioner did not comr ence his action until more than 37 months after he was allegedly first the subject of the negligent work assignment, the trial court (Superior Court of the District of Columbia) concluded that the FELA's three-year statute of limitations, 45 U.S.C. § 56 (1981), did not bar Krouse's claim because it did not begin to accrue until petitioner finally left Amtrak's employment some two years later, in early 1989. According to the trial court's decision, it was legally irrelevant whether petitioner had been on notice of a possible negligent assignment claim against Amtrak more than three years before he finally commenced his action (*see* A-4a-5a).

Accordingly, at trial, petitioner sought to recover damages for all injuries suffered by him beginning on January 16, 1987, when the alleged negligent assignment began. The jury rendered a verdict in petitioner's favor on his negligent assignment claim and he was awarded a judgment for $262,500 (A-1a-2a, 4a).

On appeal, the District of Columbia Court of Appeals (the "D.C. court of appeals") reversed and remanded for further proceedings. The D.C. court of appeals held that Krouse's cause of action under the FELA's statute of limitations accrued when the petitioner knew or should have known of his injury and that its possible cause was work-related (A-2a, 15a-16a). The D.C. court of appeals also concluded that, from the record, it could not "say when [Krouse] should have known that his

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[1] Citation to "A- " is to the opinion of the District of Columbia Court of Appeals that is attached as Appendix A to Krouse's Petition for Writ of Certiorari. The opinion is reported at 627 A.2d 489 (D.C. App. 1993). Remaining citations are to the trial court record in this action.

continued walking on ballast was aggravating his condition as opposed to any belief he might have had that it was his original injury and the recovery process associated with it which was causing his problem" (A-16a). The appellate court thus remanded the action to the trial court, instructing that Krouse would have to demonstrate to the fact-finder that the three-year limitations period was tolled between January 12, 1987, when his ankle was originally injured, and March 2, 1987, which was three years before he finally filed suit (A-16a).

STATEMENT OF FACTS

Petitioner injured himself on January 12, 1987 while working the evening shift at Amtrak as a car repairman (Trial Tr. 245, 249-250). On the morning of January 16, 1987, petitioner's supervisor, Bernard Campbell, sent Krouse to Amtrak's medical dispensary, where Dr. Josefino Ceballos diagnosed a "severely sprained" ankle, with ecchymosis of the right ankle and foot (Trial Tr. 256-257, 340, 382). Dr. Ceballos recommended that Krouse wear a figure-eight ankle brace, avoid excessive walking and work "light duty for three weeks" (Trial Tr. 257, 396-397).

That same day, when supervisor Campbell was told to give plaintiff light duty, he immediately assigned Krouse to "desk-type work" (Trial Tr. 259). About two hours later, however, a union official complained to Campbell, in petitioner's presence, about Krouse performing work that was out of his craft, at which point Campbell told petitioner he would have to return to his regular duties as a car repairman (Trial Tr. 260-261). Petitioner continued to perform regular duties from January 16, 1987 until he left Amtrak's employ more than two years later (*see* A-3a-4a). He never once went back to Amtrak's medical dispensary, or asked permission to do so (Trial Tr. 290-292).

Krouse acknowledged that after returning to his regular duties on January 16, 1987, he continued to experience a mild swelling of the ankle and a limp (Trial Tr. 263). Krouse also admitted noticing that these nagging symptoms occurred "more in the evenings and toward the end of the week" (Trial Tr. 263), and that his ankle hurt worse when he returned to work in mid to late January 1987, following a brief vacation (Trial Tr. 295, 307, 309).

Despite his continued symptoms, Krouse signed an Amtrak report on February 3, 1987 in which he certified that "during the 240 hrs. [sic] immediately following my injury [on January 12] I performed or was able to perform . . . all of the duties of the position in which I was working" (Trial Tr. 296; Def. Ex. 2). Moreover, on February 23, 1987, Krouse signed a second Amtrak form certifying that he could "perform fully and acceptably and without any extra assistance all of the duties customarily included in my assignment" and did "not have any restriction of motion as a result of [the January 12, 1987] accident" (Trial Tr. 298-299; Def. Ex. 1).

Krouse testified at trial that he complained intermittently of his pain to his supervisors and others between January 13, 1987 and early 1988 (*see* A-3a). However, for about two years, he never once sought medical assistance from Amtrak, or from anyone else (Trial Tr. 290-292). Moreover, he not only continued to perform his regular duties for Amtrak, he also worked long hours on outside jobs involving prolonged standing or physical labor (Trial Tr. 262-263, 276-277, 297-304, 321).

Finally, on January 24, 1989, Krouse consulted legal counsel, the same counsel who would represent petitioner in this FELA action (Trial Tr. 305-306). Counsel immediately directed petitioner to a Dr. Frank Watkins (Trial Tr. 303, 305-306). Dr. Watkins concluded that petitioner's prolonged walking on uneven surfaces had delayed the healing of his

initial injury and had aggravated that injury (*see* A-4a). The doctor advised light duty only and told the petitioner to avoid walking over ballast (*see* A-4a). After Amtrak's manager advised Krouse that the recommended work was not available, Krouse marked off work on January 25, 1989 and never returned (Trial Tr. 268, 275; *see* A-4a-5a).

This lawsuit was finally commenced in March 2, 1990, some thirteen months after petitioner left Amtrak's employment (*see* A-4a-5a, 16a).

ARGUMENT

I. THE DISTRICT OF COLUMBIA COURT OF APPEALS PROPERLY APPLIED FEDERAL SUBSTANTIVE LAW APPLICABLE TO THE FELA CLAIM

In interpreting the FELA's limitations provision, the D.C. court of appeals was required to apply applicable federal substantive law. *See, e.g., Monessen Southwestern Ry. v. Morgan*, 486 U.S. 330, 335 (1988); *Burnett v. New York Central R.R.*, 380 U.S. 424, 426-27 (1965); *Urie v. Thompson*, 337 U.S. 163, 174, 182 (1949). Contrary to petitioner's assertion, that is precisely what the D.C. court of appeals did (*see* A-6a-16a).[2]

Section 6 of the FELA, 45 U.S.C. § 56 (1981), mandates that "[n]o action shall be maintained under this [Act] unless

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[2] In applying federal law, the D.C. court of appeals took pains to note that it was relying in part on *United States v. Kubrick*, 444 U.S. 11 (1979), a decision of this Court frequently relied upon in applying the FELA's statute of limitations, notwithstanding the fact that the D.C. court previously had declined to follow *Kubrick* in a dental malpractice case, which was governed by local, rather than federal, common law (*see* A-6a-8a and n. 8).

commenced within three years from the day the cause of action accrued." 45 U.S.C. § 56. Compliance with this limitations provision is construed as a condition precedent to recovery under the FELA, and failure to bring suit timely "not only bars the claimant's remedy, but it also destroys the employer's liability." *Emmons v. Southern Pac. Transp. Co.*, 701 F.2d 1112, 1117 (5th Cir. 1983). *See also Kichline v. Consolidated Rail Corp.*, 800 F.2d 356, 360-361 (3d Cir. 1986); *Frasure v. Union Pac. R.R.*, 782 F.Supp. 477, 479 (C.D. Cal. 1991); *Stokes v. Union Pac. R.R.*, 687 F. Supp. 552, 555 (D. Wyo. 1988); *Lloyd v. Missouri Pac. R. Co*, 832 S.W.2d 310, 313 (Mo. App. E.D. 1992). The burden thus is on the plaintiff to establish that his case falls within an exception to the three-year limitations provision. *Emmons*, 701 F.2d at 1117-1118; *Frasure*, 782 F. Supp. at 480; *Ricard v. Elgin, Joliet & Eastern Ry.*, 750 F. Supp. 372, 375 (N.D. Ind. 1990); *Stokes*, 687 F. Supp. at 555. *See also Drazen v. United States*, 762 F.2d 56, 60 (7th Cir. 1985).

Under well-settled federal law, a cause of action under the FELA normally accrues when the plaintiff's legally protected rights have been invaded or the tortious act which causes injury has been committed. *Clay v. Union Carbide Corp.*, 828 F.2d 1103, 1106 (5th Cir. 1987); *DuBose v. Kansas City S. Ry.*, 729 F.2d 1026, 1028-1029 (5th Cir.), *cert. den.*, 469 U.S. 854 (1984). *See also Brassard v. Boston & Maine R.R.*, 240 F.2d 138, 141 (1st Cir. 1957). An FELA plaintiff has a "completely ripe cause of action" once there is a breach of duty followed by an invasion of plaintiff's interest, and "[t]he mere fact that the extent of the damage [is] not immediately manifest [does] not postpone the accrual of the cause of action." *Brassard*, 240 F.2d at 141.

Since petitioner in this case claimed he was negligently assigned to regular duty on January 16, 1987, and also admitted

to an immediate awareness of nagging symptoms associated with his regular duty assignments, Krouse clearly bore the burden of establishing in the trial court below that he was not time-barred under the FELA even though he waited well over three years before commencing his FELA suit. As the D.C. court of appeals' decision demonstrates (A-7a-15a), a plaintiff with notice of his possible claim cannot brush aside his burden under the FELA simply by arguing that defendant has committed a "continuing tort."

In assessing whether petitioner could meet his burden simply by claiming a "continuing tort," the D.C. court of appeals analyzed two key decisions of this Court, *Urie v. Thompson*, 337 U.S. 163, and *United States v. Kubrick*, 444 U.S. 111. These decisions have been widely applied to FELA actions in which the plaintiff's injury has an indefinite onset and progresses over many years **unnoticed** by the prospective plaintiff (A-7a-9a). *See, e.g., Fries v. Chicago & N.W. Transp. Co.*, 909 F.2d 1092, 1094-1095 (7th Cir. 1990) (hearing loss); *Albert v. Maine Central R.R.*, 905 F.2d 541, 543-544 (1st Cir. 1990), *aff'g Jones v. Maine Central R.R.*, 690 F. Supp. 73 (D. Me. 1988) (hearing loss); *Townley v. Norfolk & W. Ry.*, 887 F.2d 498, 501 (4th Cir. 1989) (black lung); *Kichline*, 800 F.2d 358-359 (pulmonary disease); *DuBose*, 729 F.2d at 1028-1030 (pulmonary disease).

In *Urie*, this Court concluded that in the unusual circumstance where a specific date of injury "cannot be determined" because it results from continued exposure to a harmful condition over a period of time, a plaintiff's cause of action accrues when the injury manifests itself. *Urie*, 337 U.S. at 170. Absent such a rule, this Court stressed, a plaintiff's remedy under the FELA would be "delusive" because he would be charged with knowledge of a possible claim "at some past moment in time, unknown and **inherently unknowable** even in

retrospect." *Urie*, 337 U.S. at 169 (emphasis added). Thi Court declined to attach such dire consequences in the face o what it pointedly termed a plaintiff's "**blameless** ignorance, nor could it reconcile those consequences with the "traditiona purposes of statutes of limitations, which conventionally requir the assertion of claims within a specified period of time afte **notice** of the invasion of legal rights." *Urie*, 337 U.S. at 17((emphasis added). *Urie* thus established a "discovery" rul tolling the FELA's three-year statute of limitations **only** durin the period in which the plaintiff's injury was "inherentl unknowable" and the plaintiff was acting with "blameles ignorance" -- *i.e.*, without notice of a possible claim.

The *Urie* discovery rule, as applied in FELA actions, wa later given additional judicial gloss by this Court's decision i *Kubrick*, 444 U.S. 111, a case arising under the Federal Tor Claims Act ("FTCA"), 28 U.S.C. § 2671, *et seq.* (1981). I *Kubrick*, this Court concluded that once a plaintiff is i possession of the critical facts of both an injury and its governing cause, the action accrues **regardless** of whether the plaintiff actually is aware of the legal wrong that has occurred. *Kubrick*, 444 U.S. at 120-123. *See also Fries*, 909 F.2d at 1094-95; *Albert*, 905 F.2d at 543-44; *Kichline*, 800 F.2d at 358-59; *DuBose*, 729 F.2d at 1029-1030.

In *Kubrick*, this Court stressed that statutes of limitation represent a "pervasive legislative judgment that it is unjust to fail to put the adversary on notice to defend within a specified period of time and that 'the right to be free of stale claims in time comes to prevail over the right to prosecute them.'" *Kubrick*, 444 U.S. at 117, quoting *Railroad Telegraphers v. Railway Express Agency*, 321 U.S. 342, 349 (1944). Such statutes afford plaintiffs "what the legislature deems a reasonable time to present their claims" and concomitantly "protect defendants and the courts from having to deal with cases in

which the search for truth may be seriously impaired." *Kubrick*, 444 U.S. at 117. *Kubrick* instructs that a court is "not free to construe [a federally-legislated limitations period] so as to defeat its obvious purpose, which is to encourage the prompt presentation of claims." *Kubrick*, 444 U.S. at 117.

Echoing *Urie*, this Court in *Kubrick* sharply distinguished between a plaintiff whose injury "may be unknown or unknowable" (444 U.S. at 122) and a plaintiff who **does** have notice of his injury and its possible cause:

> The prospect is not so bleak for a plaintiff in possession of the critical facts that he has been hurt and who has inflicted the injury. . . . There are others who can tell him if he has been wronged, and he need only ask.

Kubrick, 444 U.S. at 122. According to this Court:

> A plaintiff . . . armed with the facts about the harm done to him, **can protect himself by seeking advice** in the medical and legal community. To excuse him from promptly doing so by postponing the accrual of his claim would **undermine the purpose of the limitations statute.** (Emphasis added)

Kubrick, 444 U.S. at 123.

Based on the teachings of *Urie* and *Kubrick*, the courts have applied a discovery exception to the traditional accrual rule in FELA cases that is limited to injuries or illnesses which first manifest themselves some time after exposure to the harm began, concluding that the cause of action will first accrue for purposes of the FELA's limitations provision when a reasonable person knows or in the exercise of reasonable diligence should have known of the injury and its governing causes. *Fries*, 909

F.2d at 1095 (hearing loss); *Bealer v. Missouri Pac. R.R.*, 9
F.2d 38, 39 (5th Cir. 1991) (hearing loss); *Albert*, 905 F.2d
543-544 (hearing loss); *Townley*, 887 F.2d at 501 (black lun
DuBose, 729 F.2d at 1030 (pulmonary disease). *See a*
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Supp. at 374-75 (hearing loss); *Stokes*, 687 F. Supp. at 553-5
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WL 183856 at pp. 2-3 (N.D. Ill. Sept. 16, 1991) (hearing los
Meier v. Chicago & N.W. Transp. Co., 1991 WL 49620 at p
(N.D. Ill. April 2, 1991) (hearing loss); *Alexander v. Misso*
Pac. R.R., 827 S.W.2d 757 (Mo. App. 1992) (hearing los
The courts have repeatedly stressed that plaintiff **cann**
postpone the running of the three-year statute of limitatio
once he has notice of his potential claim. *See, e.g., Fries*, 9
F.2d at 1095 (to allow plaintiff to postpone the running of t
statute of limitations by negligently failing to investigate t
fact of and cause of his injury would thwart the intent of
U.S.C. § 56); *Albert*, 905 F.2d at 543 (legislative intent is th
the right to be free of stale claims comes to prevail over t
right to prosecute them); *Kichline*, 800 F.2d at 359 (plaint
must seek medical and legal advice and determine whether
sue or not); *Stoleson v. United States*, 629 F.2d 1265, 1269-
(7th Cir. 1980) (plaintiff armed with knowledge is no longer
mercy of defendant's specialized knowledge).

All of these FELA decisions necessarily involve alleg
continuing torts by defendants. Yet **none** of them suggests th
a plaintiff may continue to postpone the running of the FELA
limitations period regardless of when plaintiff has notice of h
potential claim. As such, they implicitly reject petitioner
attempt to create further inroads into the FELA's three-ye
statute of limitations through his "continuing tort" argumer
Moreover, numerous FELA decisions have **explicitly** rejecte
any purported "continuing tort" exception to the discovery ru

in FELA cases. *See Kichline*, 800 F.2d 360; *Ricard*, 750 F.Supp. at 375; *Courtney v. Union Pac. R. Co.*, 713 F.Supp. 305, 309-310 (E.D. Ark. 1989); *Stokes*, 687 F.Supp. at 668; *Johnson v. Norfolk & W. Ry. Co.*, 836 S.W.2d 83, 85 (Mo. App. E.D. 1992).

Despite this array of authority, petitioner persists in arguing that the applicable federal substantive law renders notice irrelevant when there is a "continuing tort" (Petition at 6-9).[3] He relies on two decisions, *Fletcher v. Union Pac. R.R.*, 621 F.2d 902 (8th Cir. 1980), *cert. den.*, 449 U.S. 1110 (1981) and *Fowkes v. Pennsylvania R. Co.*, 264 F.2d 397 (3d Cir. 1954), which purportedly require the courts to apply a "continuing tort" exception (Petition at 6-7). These decisions do not, however, provide petitioner the support he claims.

As the D.C. court of appeals concluded (A-11a-13a), *Fletcher*, 621 F.2d 902, was simply wrongly decided on the statute of limitations issue, and *Fowkes*, 264 F.2d 397, simply does not support petitioner's position. *See Kichline*, 800 F.2d at 359-60; *Ricard*, 750 F. Supp at 375; *Courtney*, 713 F.Supp. at 309-310; *Stokes*, 687 F. Supp at 552-53; *Lloyd*, 832 S.W.2d at 312-313.

Fourteen years ago, the Eighth Circuit Court of Appeals decided in *Fletcher* that the FELA statute of limitations is automatically tolled so long as a continuing tort of negligent assignment is being committed. *Fletcher*, however, relied

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[3] Krouse's petition specifically does not raise as an issue the D.C. court of appeals' additional holding that Krouse cannot escape the FELA's three-year limitations bar by claiming that, regardless of when he first had notice of a possible claim, he may pursue a separate cause of action for aggravation of his injury to the extent that the aggravation occurred within three years of filing (*see* A-16a-17a) (and cases cited therein). Accordingly, respondent does not address this issue, and the ample grounds for the D.C. court's conclusion, in this opposition brief.

chiefly, and mistakenly, on the Third Circuit's decision in *Fowkes*, 264 F.2d 397. *See Fletcher*, 621 F.2d at 908 (construing *Fowkes* to mean that a harmful working condition may be treated as a continuing or frequently-repeated wrong which tolls the running of the statute of limitations). *Fletcher* simply misread *Fowkes'* import, just as petitioner continues to do now. Subsequent to the Eighth Circuit's decision in *Fletcher*, the Third Circuit Court of Appeals expressly concluded in *Kichline*, 800 F.2d 356, that its earlier decision in *Fowkes* could not be read to mean that a continuing tort tolls the statute of limitations. *Kichline*, 800 F.2d at 358-360. According to the Third Circuit:

> We understand *Fowkes* to mean that **continuing conduct of defendant will not stop** the ticking of the limitations clock **once the plaintiff obtained requisite information**. On discovering an injury and its cause, a claimant must choose to sue or forego that remedy. This interpretation is supported by *Kubrick*, which requires a plaintiff to take prompt action to seek redress. (Emphasis added)

Kichline, 800 F.2d at 360.

Kichline thus exposed the Eighth Circuit's ruling in *Fletcher* as fundamentally flawed and also reveals petitioner's fatal error in relying on *Fletcher* and *Fowkes* to support his petition in this Court. *See Ricard*, 750 F. Supp at 375; *Courtney*, 713 F.Supp. at 309-310; *Stokes*, 687 F. Supp. at 552-53; *Lloyd*, 832 S.W.2d at 312. *Compare Corrigan v. Burlington N. R. R.*, 612 F. Supp. 665, 668 (D. Minn. 1985) (decided before *Kichline* and adopting *Fletcher's* erroneous interpretation of *Fowkes*). The D.C. court of appeals, therefore, properly rejected petitioner's

argument that these two decisions might justify brushing aside the limited discovery rule if there is a "continuing tort."

Petitioner insists that there is an important distinction between the many FELA occupational disease cases applying the discovery rule and his negligent assignment case (Petition at 8). Yet he cannot explain why there is any remotely persuasive distinction for purposes of the FELA's three-year statute of limitations. In both situations, a plaintiff is simply required to take reasonable steps to investigate the possibility that he or she is suffering a continuing injury due to a wrong being committed by the defendant, and will not be permitted toll the limitations period indefinitely by taking no action whatsoever to pursue a possible legal remedy.

Petitioner also tries to argue that staleness is not a problem when there is a continuing tort (Petition at 9). But that is obviously not so. Under petitioner's theory, he would be entitled to remain at his job for ten years after obtaining notice that his continued job assignments were aggravating an old ankle injury, then commence an FELA action in which he could seek recovery for injuries spanning the entire ten years. That result runs completely counter to this Court's decisions in *Urie*, 337 U.S. at 170, and *Kubrick*, 444 U.S. at 123. *See also Kichline*, 800 F.2d at 360.

The D.C. court of appeals did not deviate from applicable federal substantive law. Quite the contrary, the court faithfully adhered to the teachings of this Court in *Urie*, 337 U.S. 163, and *Kubrick*, 444 U.S. 111, and the lessons of FELA case law throughout the country, by concluding that a "continuing tort" did not excuse petitioner from pursuing an FELA action within three years of when he had notice of his potential claim.

II. THE DISTRICT OF COLUMBIA COURT OF APPEALS' DECISION NEED NOT BE READ TO CONFLICT WITH THE DECISIONS OF THE U.S. COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA IN NON-FELA CASES

Petitioner argues that the D.C. court of appeals' decision is inconsistent with decisions of the U.S. Court of Appeals for the District of Columbia concerning the continuing tort doctrine (Petition at 10). Petitioner chiefly cites *Page v. United States*, 729 F.2d 818 (D.C. Cir. 1984), which held that in a medical malpractice action under the FTCA, the limitations period only begins to run when the tortious conduct ceases. *Page*, however, is not an FELA case, and the U.S. Court of Appeals for the District of Columbia has never had occasion to examine the "continuing tort" doctrine in the context of the FELA's limitation provision. The D.C. court of appeals, therefore, had ample grounds for concluding that the *Page* reasoning should not be applied to an FELA action, where to do so "would be at odds with the interpretation of the FELA by the more persuasive federal cases and with the purpose of the FELA statute of limitations" (A-14a-15a).

The D.C. court of appeals is not alone in declining to follow the rationale of a non-FELA case like *Page* in interpreting the FELA's three-year statute of limitations. *See, e.g., Kichline*, 800 F.2d at 360; *Stokes*, 687 F.Supp. at 554-555; *Lloyd*, 832 S.W.2d at 312-313. Moreover, at least one court has concluded that, apart from being a non-FELA action, the *Page* reasoning may be distinguished simply because it is a medical malpractice claim. *Lloyd*, 832 S.W. at 312-313. In *Kubrick*, this Court specifically acknowledged authority indicating that courts have departed from the usual statute of limitations rules when

medical malpractice claims are involved, because these claims typically involve short statutes of limitation and involve relationships in which the patient places special faith in the physician. *See Kubrick*, 444 U.S. at 121 n.7 (quoting discussion in Restatement (Second) of Torts §899, Comment e, pp. 444-445 (1979)).

The D.C. court of appeals concluded that blind application of the rationale of a non-FELA action like *Page* to an FELA action would be inconsistent with the well-developed FELA decisional authority discussed at length in Point I (*see* A-14a-15a). Since the U.S. Court of Appeals for the District of Columbia has not yet addressed the precise issue presented here, there is no reason to assume it would not be similarly persuaded by this body of authority dealing specifically with FELA actions. Accordingly, the D.C. court's decision need not be read as in conflict with decisions of the U.S. Court of Appeals for the District of Columbia.

CONCLUSION

The petition for writ of certiorari should be denied.

Dated: July 19, 1994

Respectfully submitted,

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1994

STEVEN KROUSE,
Petitioner,

v.

NATIONAL RAILROAD PASSENGER CORPORATION,
Respondent.

On Petition for Writ of Certiorari to the Court of Appeals for the District of Columbia

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PETITIONER'S REPLY BRIEF

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

No. 93-1959

STEVEN KROUSE,
Petitioner,

v.

NATIONAL RAILROAD PASSENGER CORPORATION,
Respondent.

On Petition for Writ of Certiorari to the Court of Appeals for the District of Columbia

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PETITIONER'S REPLY BRIEF

ARGUMENT IN REPLY

I. THE DISTRICT OF COLUMBIA COURT OF APPEALS HAS EVISCERATED THE CONTINUING VIOLATION RULE AND RENDERED IT A NULLITY UNDER THE FEDERAL EMPLOYERS' LIABILITY ACT (FELA) IN THE DISTRICT OF COLUMBIA.

By its decision in *National R.R. Passenger Corp. v. Krouse*, 627 A.2d 489 (D.C. 1993), the District of Columbia Court of Appeals has side-stepped applicable federal law and exceeded its authority. Respondent encourages the Court to allow the appellate court's decision to stand. The Court must decline.

The cases principally relied upon by the District of Columbia Court of Appeals do not apply to the case at bar. *See, e.g., Albert v. Maine Cent. R. Co.*, 905 F.2d 541 (1st Cir. 1990); *Fries v. Chicago & N.W. Transp. Co.*, 909 F.2d 1092 (7th Cir. 1990); *Dubose v. Kansas City S.Ry. Co.*, 729 F.2d 1028 (5th Cir. 1984), *cert. denied*, 469 U.S. 854, 105 S.Ct. 179, 83 L.Ed.2d 113 (1984). These cases have nothing to do with, and do not pretend to determine when the statute of limitations with respect to FELA actions based on the continuing violation rule commences to run.

First, the facts of these cases do not give rise to a continuing violation. Second, in these cases, neither party argued nor contended that the claims asserted constituted a continuing violation. Third, the courts in these cases did not *sua sponte* address the applicability of the continuing violation rule in reaching their conclusions.[1]

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[1] Respondents also cites *Bealer v. Missouri Pac. R.R.*, 951 F.2d 38, 39 (5th Cir. 1991); *Frasure v. Pennsylvania R. Co.*, 782 F. Supp. 477, 480-81 (C.D.Cal. 1991); *Ricard v. Elgin, Joliet & Eastern Ry. Co.*, 750 F.Supp. 372, 374-75 (N.D.Ind. 1990); *Roesch v. Chicago & N.W. Transp. Co.*, 1991 WL 183856 pp. 2-3 (N.D. Ill. Sept. 16, 1991); *Meier v. Chicago & N.W. Transp. Co.*, 1991 WL 49620 p. 2 (N.D. Ill. April 2, 1991); *Townley v. Norfolk & W. Ry.*, 887 F.2d 498, 501 (4th Cir. 1989); *Alexander v. Missouri Pac. R.R.*, 827 S.W.2d 757 (Mo.App. 1992). (Respondent's Brief p. 10). Although Respondent argues that these FELA cases "necessarily involve alleged continuing torts by defendants," (Respondent's Brief p. 10), the applicability of the continuing violation rule was only at issue in *Ricard, infra*, and *Alexander*. (In *Alexander*, the Missouri Court of Appeals ruled that plaintiff's reliance on *Fletcher v. Union Pac. Ry. Co.*, 621 F.2d 902 (8th Cir. 1980), *cert. denied*, 101 S.Ct. 918 (1981), in which the eighth circuit court held that the FELA statute of limitations for a continuing tort did not begin to run until defendant's tortious conduct ceased, was misplaced as plaintiff's negligent assignment claim was not comparable to the plaintiff's in *Fletcher*. *Alexander*, 827 S.W.2d at 758). Moreover, in those FELA cases in which the court specifically rejected the continuing violation rule, *see Ricard*, 750 F.Supp. at 375; *Courtney v. Union Pac. R. Co.*, 713 F.Supp. 305, 309-10 (E.D. Ark. 1989); *Stokes v. Union Pacific R. Co.*, 687 F.Supp. 552, 668 (D.Wyo. 1988);

These cases discussed the discovery rule. The courts in these *occupational disease* cases stated that when the FELA three year statute of limitations period commenced turned on when the plaintiffs were aware of their injury and its cause. Accordingly, the discovery rules of *United States v. Kubrick*, 444 U.S. 111 (1979) and *Urie v. Thompson*, 337 U.S. 163 (1949), emanating from cases which did *not* involve claims based on continuing tortious conduct (*Kubrick* being a medical malpractice case and *Urie* a latent injury case), governed these cases.

In relying upon this line of decisions, the District of Columbia Court of Appeals has chosen to ignore decisions which are directly on point. *Fowkes v. Pennsylvania R.R. Co.*, 264 F.2d 397 (3d Cir. 1959), *Fletcher v. Union Pac. Ry. Co.*, 621 F.2d 902 (8th Cir. 1980), *cert. denied*, 101 S.Ct. 918 (1981), and *Kitchline v. Consolidated Rail Corp.*, 800 F.2d 356 (3d Cir. 1986), are the *only* federal circuit deciisons which analyze the continuing violation rule under FELA. None of these decisions support the conclusion reached by the District of Columbia Court of Appeals. On the contrary, each of these decisions require that the judgment of the trial court be affirmed because Petitioner's claim was properly made within the statutory period.

Fowkes v. Pennsylvania R.R. Co., supra, and *Fletcher v. Union Pac. Ry. Co., supra*, held that the statute of limitations for a continuing tort does not begin to run until the tortious conduct ceases.[2] Applying these holdings, Krouse's statute did not expire until January 1992,

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Johnson v. Norfolk & W. Ry. Co., 836 S.W.2d 83, 85 (Mo.App.E.D. 1992), the evidence did not demonstrate continuous tortious conduct. (Respondent's Brief pp. 10-11; *see also* Petitioner's Brief pp. 6-7 note 4).

[2] In *Fletcher*, the court explicitly distinguished between a negligent assignment claim and a claim based upon industrial disease. *Fletcher*, 621 F.2d at 907-08, holding that the (*Urie*) discovery rule did not apply in the latter situation. *Id.* at 906-08.

three years after he left Amtrak.[3] The *Kitchline* court opined that the cause of action accrues for a continuous tort under FELA when the party knew or should have known that he suffered harm. However, the *Kitchline* court, in ruling that the continuing violation rule was inapplicable to plaintiff's claim, pointed out that plaintiff did not make out a claim for negligent assignment—plaintiff neither presented evidence that he notified his supervisor of his condition nor did he request reassignment—citing *Emmons v. Southern Pacific Transp. Co.*, 701 F.2d 1112 (5th Cir. 1983) and *Fletcher* (cases in which the courts held that the continuing violation rule applied to negligent assignment claims).[4] *Kitchline v. Consolidated Rail Corp.*, 800 F.2d at 358-59. Even so, the *Kitchline* Court recognized that any harm resulting from continuous conduct, which happened during the three year period before that filing of the complaint was properly before the court and timely. *Id.* And unlike the lower court in *Kitchline,* the District of Columbia trial court found that Petitioner *had* presented evidence to support continuous negligence and repeated trauma following injury, hence, an action for negligent assignment—1) Krouse continuously complained to his supervisor, and 2) Krouse's supervisors kept assigning him to work which aggravated his condition.

Under the guise of protecting Respondent from stale claims, the District of Columbia Court of Appeals erroneously applied the discovery rule to a scenario properly governed by the continuing violation rule. By its decision, the District of Columbia Court of Appeals has granted Amtrak, in Washington, D.C., the license to engage in tortious conduct continuously without reprisal. By its de-

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[3] As Petitioner filed his claim in March 1990, his claim was not barred by FELA's three-year limitations period.

[4] In Part I of his argument Petitioner pointed out that in *Emmons v. Southern Pacific Transp. Co.*, 701 F.2d 1112, 1120-21 (5th Cir. 1983), the court recognized that the continuing violation rule applied to claims for negligent assignment. Pet. Br. pp. 8-9.

cision, the Court has ignored and capriciously side stepped the very essence of the continuing violation rule: As long as the wrongdoer does harm, each new wrong causes the statute of limitations to begin anew.

This is not a new concept. This Court [6] and federal circuits have repeatedly recognized the viabilty of the continuing violation rule. The question of the applicability of the continuing violation rule has arisen in a variety of contexts in the District of Columbia circuit. *See e.g., Whelan v. Abell,* 953 F.2d 663 (D.C. Cir. 1992), *certiorari denied, Toomey v. Whelan,* 113 S.Ct. 300, 121 L.Ed.2d 223, *on remand* 1993 WL 141073 (continuous tortious interference with business opportunities); *Beatty v. Washington Metropolitan Area Transit Authority,* 860 F.2d 1117 (D.C. Cir. 1988) (continuing nuisance); *Page v. United States,* 729 F.2d 818 (D.C. Cir. 1984) (continuous medical malpractice); *Macklin v. Spector Freight Systems, Inc.,* 478 F.2d 979 (D.C. Cir. 1973) (continuous discriminatory practices); *Underwater Storage Inc.,* 371 F.2d 950 (D.C. Cir. 1966), *certiorari denied,* 87 S.Ct. 859, 386 U.S. 911, 17 L.Ed.2d 794, *on remand,* 314 F.Supp. 546 (continuing use of trade secret). The continuing violation rule is recognized in other circuits. *See, e.g., Santiago v. Lykes Bros. S.C. Co., Inc.,* 986 F.2d 423 (11th Cir. 1993) (Jones Act case involving continuous exposure to loud noises resulting in hearing loss); *Robinson v. Maruffi,* 895 F.2d 649 (10th Cir. 1990) (continuing malicious prosecution conspiracy); *Gross v. United States,* 676 F.2d 295 (8th Cir. 1982) (continuing violation of federal (ASCS) regulations); *Leonhard v. United States,* 633 F.2d 599, 613 (2d Cir. 1980), *certiorari denied,* 451 U.S. 908, 101 S.Ct. 1975, 68 L.Ed.2d 295 (1981) (continuing violation of constitutional rights); *Fletcher v. Union Pac. R.R., supra,* 621 F.2d at 907-08; *Donaldson v. O'Connor,* 493 F.2d

[6] *See,* Petitioner's Brief p. 7, citing, *Havens Realty Corp. v. Coleman,* 455 U.S. at 363 (1982); *Hanover Shoe v. United Shoe Mach. Corp.,* 392 U.S. 481 (1968).

507, 529 (5th Cir. 1974), *vacated on other grounds,* 422 U.S. 563, 95 S.Ct. 2486, 45 L.Ed.2d 396 (1975) (continuing deprivation of constitutional rights); *Fowkes v. Pennsylvania R.R., supra,* 264 F.2d at 397; *Lavelle v. Listi,* 611 F.2d 1129, 1132 (5th Cir. 1980). Thus, the District of Columbia Court of Appeals not only ignored controlling federal substantive law, but also failed to adhere to D.C. precedent.

II. THE DECISION OF THE DISTRICT OF COLUMBIA COURT OF APPEALS REPRESENTS AN EXERCISE OF JUDICIAL ABUSE OF POWER.

Having recognized that the evidence presented a continuing violation,[6] the District of Columbia Court of Appeals refused to follow and apply the continuing violation rule. In doing so, the District of Columbia Court of Appeals erred and committed a manifest injustice. Thus, by its ruling in *National R.R. Passenger Corp. v. Krouse, supra,* 627 A.2d 489, the District of Columbia Court of Appeals has forever foreclosed the right of the railroad workers to assert the continuing violation rule in the District of Columbia. This is wrong. It contravenes the most analogous and applicable federal common law.

At its core, the issue presented by Petitioner in Part I of its argument: *Whether the District Court of Appeals violated the mandate of this Court in Monessen Southwestern R. Co. v. Morgan,* 486 U.S. 330 (1988) *requiring state courts to apply federal substantive common law in adjudicating FELA claims,* is one of power. The decision of the District of Columbia Court of Appeals represents an exercise of judicial hubris and an abuse of power. The court below took great pains to avoid applying appropriate federal substantive law.

Much of the court's opinion is devoted to explaining why it chose *not* to follow federal precedent respect-

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[6] *Krouse, supra,* 627 A.2d at 495.

ing the continuing violation rule under FELA. However, the District of Columbia Court of Appeals, the equivalent of a state Supreme Court, does not have the power or authority to disregard the commands of the federal common law interpreting FELA. *Monessen Southwestern Ry. Co. v. Morgan*, 486 U.S. 330 (1988); *St Louis Southwestern R. Co. v. Dickerson*, 470 U.S. 409, 411, 84 L.Ed.2d 303, 105 S. Ct. 1347 (1985) (*per curiam*); *Chesapeake & Ohio R. Co. v. Kuhn*, 284 U.S. 44, 46-47, 76 L.Ed. 157, 52 S. Ct. 45 (1931). At issue before the Court now is: *Whether the United States Supreme Court will allow the District of Columbia Court of Appeals to act so capriciously with complete disregard for federal common law which is squarely on point?*

To reach a result which it favored, at the urging of Respondent, the lower court misapplied the law. The lower court's rationale is illogical and inconsistent with its finding that negligent assignment is a continuing tort. *Krouse, supra*, 627 A.2d at 495 (citing *Fogg v. National R.R. Passenger Corp.*, 585 A.2d 786, 789 (D.C. 1991). This Court must not let this decision stand.

CONCLUSION

The Court should reverse *National R.R. Passenger Corp. v. Krouse*, 627 A.2d 489 (D.C. 1993).

Respectfully submitted,

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